Nos. 14930-31-32

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14930

RAMESON BROTHERS, etc., *et al.*,

Appellants,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy, etc., *et al.*,

Appellees.

No. 14931

FREDERICK M. RAMESON, Bankrupt,

Appellant,

vs.

GEORGE T. GOGGIN, as Trustee in Bankruptcy, etc., *et al.*,

Appellees.

No. 14932

WILLIAM W. RAMESON, Bankrupt,

Appellant,

vs.

GEORGE T. GOGGIN, as Trustee in Bankruptcy, etc., *et al.*,

Appellees.

Appeals From the United States District Court for the Southern District of California, Central Division.

REPLY BRIEF OF APPELLANTS.

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I.

Were the Trustee's Specifications of Objections to Discharge Barred as Not Having Been Filed Within the Statutory Time?

Counsel for appellees state that certain cases cited by appellants "hold exactly the opposite" to that contended by the appellants. In our opinion the cases go even further than contended by appellants.

In *In re Brecher* (C. A. N. Y.), 4 F. 2d 1001, the court entered a *nunc pro tunc* order allowing the filing of the specifications of objections after the time had expired because of excusable neglect of a clerk in filing the specifications *48 hours* after the time had expired. In so doing the court quoted from *In re Clothier* (D. C.), 108 Fed. 199, that "General Order 32 should be strictly complied with, and failure so to do will only be excused when excellent reasons therefor are shown to the court." Surely the negligence of a clerk in the bankruptcy court should not be used to penalize a litigant.

In *Rerat v. Fisk Tire Inc.* (C. A. Minn.), 28 F. 2d 607, the trustee had made timely appearance and obtained time within which to file his specifications. On the day to which time had been extended additional claims were filed which had not been scheduled and "The trustee and the creditors cooperating with him were surprised." Later, on proper motion, the court permitted them to file their specifications of objections.

And in *In re Kuhne*, 18 Fed. Supp. 985, the court said:

> *"The court is powerless to extend the time within which the creditor may file specifications of objections, although in certain instances for a good cause shown the court may adjourn the entire proceedings for a reasonable time."*

In this case fraud was alleged based upon newly discovered evidence. The court said that even if the discharge had been granted the allegations, if proven, would be sufficient to set aside the discharge, so in the exercise

of its equitable powers, the court granted a motion to amend the specifications.

The Court in *In re Reigel*, 21 Fed. Supp. 565, said: "The court is without power to extend the time within which objections to discharge may be filed." (P. 566.)

Counsel for appellees then say: "* * * and then the court, in that case, in order to prevent the discharge of the bankrupt, states that even without the objections being on record, the court can hear evidence at the time set for the hearing and deny the discharge." and quotes from the case itself. However, appellee's own quotation is that *"Any party in interest may present such evidence in the same manner and with the same effect as if it had been offered by the original objecting creditor."* Does appellee contend that this allows the court to hear the matter "even without the objections being on record?"

Section 14(b) of the Bankruptcy Act provides:

> "* * * Upon the expiration of the time fixed in such order or of any extension of such time granted by the court, *the court shall discharge the bankrupt if no objection has been filed; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge.* * * *"

Therefore, it is clear that the Act itself provides for a hearing *only* if objections have been filed. In the *Reigel* case objections had been filed. This case holds that if valid objections have been filed by one creditor any other creditor may prove up the objections. To hold otherwise would permit a bankrupt to make a deal with an object-

ing creditor after other creditors had relied upon the objections on file and after the time had expired for the filing of objections. The court should not require each creditor to make the same objections and encumber the record but should allow any creditor to rely upon any valid objection on file.

And in the *Levin* case in 176 Fed. 177, the referee, within the time for any objections, advised the court that "Not having as yet sufficient information upon which to make report upon the bankrupt's application for discharge * * *" he would like to have the matter continued and it was continued.

All of these cases, as contended by appellants, hold that any extension of time for filing objections to discharge must be based upon good and sufficient reasons. Under the old act the cases hold that the court is without power to grant an extension but under its equitable powers could continue the hearing or, if the circumstances of the particular case warranted, could permit late filing of the specifications.

But in the case at bar it is contended that no good and sufficient reason for any extensions had been shown. When the specifications were filed in November they were based upon information the trustee knew since January.

Appellants contend that any extension of time to file the specifications under Section 14(b) of the Act must be obtained within the time originally fixed or any valid extension thereof or the court loses jurisdiction to hear the objections, unless upon proper motion based upon good and sufficient reasons the court permits the late filing of the specifications.

II.

Evidence Was Insufficient to Support Orders by Court and Referee and Findings and Conclusions in Support Thereof.

Appellees make much of the portion of one answer of the bankrupt Frederick M. Rameson while a witness at a 21A examination that "Frankly, sir, I cannot account for it," *i. e.* account for the deficiency of assets to meet the liabilities. Perhaps it was unfortunate that the witness used these words. However, the court should not base its finding upon these few words. The balance of the answer explains what the witness meant. He was amazed to learn they had been operating at a loss.

All of the evidence must be considered to determine if the findings of the referee were based upon sufficient evidence. An examination of the evidence will show that the bankrupts started out building houses making a profit of from $2,000.00 to $3,000.00 on each house and the witness testified they tried to establish a minimum fee in building a house of $2,500.00. [Tr. p. 114.]

An examination of all of the evidence will disclose that the bankrupts started out in a small way, using chiefly subcontractors to build the houses, but gradually doing more and more of the building themselves with their own employees, setting up their own architectural staff, electrical, landscaping, cabinet making and painting divisions. The evidence also discloses that the accounting department failed to keep up with the increased business and that is probably where the cause of the failure arose; ignorance of the true financial condition until the situation was hopeless. But all bankrupts have gone broke or they would not be in the bankruptcy court. The fact that

there were not sufficient assets to meet the obligations is not ground for denial of a discharge! Only the failure to explain *satisfactorily* any losses of assets or deficiencies of assets to meet the liabilities is sufficient. Appellants contend the explanations were sufficient and that the findings to the contrary are clearly erroneous and should be corrected.

Appellees challenge the appellants to produce any case in which the court failed to sustain a denial of a discharge where a bankrupt has *admitted* that he cannot explain the reason for the loss and cite *In re Beckman,* 6 Fed. Supp. 957.

The *Beckman* case was a failure to keep proper books and records case in which the bankrupt admitted he had made gifts to relatives while insolvent and also *estimated* that he had lost $5,000.00 through sales at a loss to meet competition. The court held that the books did not verify or affirm these estimates and therefore the explanation could not be regarded as satisfactory.

In the cases at bar the evidence is exactly to the contrary. The books and records account for all of the assets and explain the reason for the deficiency in assets to meet the liabilities. The bankrupts were *unwittingly* operating at a loss. As soon as the bankrupts learned this they acted immediately to prevent any further losses and gave all information to the creditors.

Frederick Millard Rameson testified as follows [Tr. p. 125]:

> "* * * You see, when I got the information on Friday, the following Monday immediately as soon as I knew the problem, I went to the two major lending institutions and laid all of the facts rightly

clearly before them, and the following Wednesday, two days following, I laid all of the facts completely before the major creditors."

Appellants have been unable to find a reported case where a discharge was denied under circumstances similar to the evidence in the case at bar. That is one of the reasons appellants are contending that the findings are not supported by the evidence. Appellants contend that the findings are clearly erroneous and should be corrected by this court. (See cases cited, App. Op. Br. p. 13.)

Appellants contend that in addition to insufficient evidence to sustain the findings and order the objectors failed to establish a *prima facie* case. As set forth on page 20 of Appellant's Opening Brief, counsel for Trustee admitted that the Trustee had been able to ascertain from the books and records the true financial condition of the business and the costs which were running far in excess of the contract price. *What was there for bankrupts to answer.* No charges were made that any business transaction was not reflected in the books or records. No charges were made that any actual assets were unaccounted for. Cases cited by Appellees involve situations where deficiency could only loosely be explained and which involved the element of concealment. In the instant matter the trustee had actual knowledge from the books and records as to why the loss was incurred. After such an admission and as no claim was made to disappearance of assets Appellants contend that objector has not established a *prima facie* case to place the burden of proof of satisfactory explanation on bankrupts.

Conclusion.

We respectfully submit, as we did in our opening brief, that from the facts and the law that the orders involved in this consolidated appeal should be reversed.

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